In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 459

DOMINIC DANIEL AIRDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1967. A petition for rehearing was denied on July 12, 1967. The petition for a writ of certiorari was filed on August 5, 1967. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error to admit at trial petitioner's prior testimony on an unsuccessful motion to suppress, and if so, whether that error was prejudicial.
2. Whether the indictment was fatally defective.
3. Whether evidence obtained with the consent of the person with whom petitioner shared premises was properly admitted in evidence.

STATEMENT

Petitioner was convicted in the United States District Court for the Northern District of Illinois of unlawfully receiving property stolen from interstate commerce, in violation of 18 U.S.C. 659. On June 9, 1966, he was sentenced to imprisonment for two years. The court of appeals affirmed the conviction (Pet. App. A).

The indictment related to the possession of a Muntz television set stolen from interstate commerce. It was stipulated at trial that the set was stolen from interstate commerce (A. 35-39).[1] Other evidence at trial showed that after F.B.I. agents John Chadwick and Antonius Genakos found the stolen set in the apartment of Miss Mary Hilan,[2] with whom peti-

[1] "A." designates appellant's appendix in the court of appeals which is on file with the Clerk of this Court.

[2] The circumstances giving rise to the discovery of the television set are discussed *infra*, p. 6.

tioner lived, she advised the agents that it was given to her as a gift and telephoned petitioner. On the telephone, petitioner told agent Genakos that Miss Hilan had nothing to do with the television—that he had given it to her. The agents then interviewed petitioner at his place of work. They advised him of his right to counsel and his right to remain silent. Petitioner stated that he had already consulted counsel and explained to the agents that he had bought the television set three months before for $200. Although he would not identify the seller, he stated that he had assumed that it was "hot" when he bought it, and that one week later he had realized that the set was in fact stolen (A. 22-25).

ARGUMENT

1. In order to make a showing of standing at the hearing on the motion to suppress, petitioner testified that he had lived in, and paid the rent for, the apartment in which the television set was found (A. 19-20). These judicial admissions were, over petitioner's objection, received in evidence at trial as part of the government's case-in-chief (A. 40-41).

The question whether testimony of a defendant at a hearing on a motion to suppress may be used as evidence at trial is before this Court in *Thomas Earl Simmons and Robert James Garrett* v. *United States*, No. 55, this Term, certiorari granted, June 12, 1967. We suggest, however, that whatever the Court's disposition of that case, there is no occasion for further review here. Even if the reception of petitioner's

previous testimony in the instant case should be deemed erroneous, such error was clearly harmless. As petitioner's counsel noted in closing argument (A. 57),[3] there was absolutely no controversy that petitioner had possessed the television set which was found in the apartment. Prior to the introduction of the challenged testimony, petitioner's statement that he had purchased the television set for $200 was received in evidence (A. 25). Testifying in his own behalf, petitioner admitted the purchase, claiming only that he had been unaware that the set had been stolen (A. 50-52). We therefore submit that even if the reception of the prior testimony was error, that error, beyond a reasonable doubt, did not contribute to the verdict of the jury. See *Chapman* v. *California*, 386 U.S. 18, 24.

2. So far as pertinent, the indictment charged (A. 4):

> That on or about October 19, 1965, at Cicero, in the Northern District of Illinois, Eastern Division, DOMINIC DANIEL AIRDO, defendant herein, did unlawfully buy, receive, and have in his possession a certain chattel, to wit, a Muntz Television set Number 18839, of a value in excess of One Hundred Dollars ($100.00), which had been embezzled, stolen, and unlawfully taken,

[3] In closing argument, petitioner's counsel affirmatively seized upon the fact that possession was uncontroverted in an attempt to discredit the government's case by pointing out that although Chadwick testified to petitioner's testimony at the motion to suppress—"because there is no issue on it"—he did not testify on the critical issue of knowledge (A. 57).

> carried away, concealed and by fraud and deception obtained from a motor truck * * * which was moving as, which was a part of, and which did constitute an interstate shipment of freight * * *.

Although no motion was addressed to the indictment in the trial court, petitioner contended in the court of appeals that it was fatally defective for failing to allege that petitioner knew that the television set was stolen. The court of appeals properly rejected that argument. Where, as here, no motion attacking the indictment is made until after the verdict, when the case is on appeal, the indictment should be sustained if the necessary elements appear in any form, or by fair construction can be found, within the terms of the indictment. *Hagner* v. *United States*, 285 U.S. 427, 433. Although the indictment did not expressly allege that petitioner knew that the set was stolen, that was the clear implication of the allegation that he had unlawfully received and possessed the television set which had been stolen from interstate commerce. By fair construction, the word "unlawfully" supplied the required element of knowledge, since possession of the television set under 18 U.S.C. 659 would have been unlawful only if petitioner had known that it was stolen. Nor was petitioner prejudiced by the terminology used; the court charged that he could not be convicted unless the jury found that he had received the television set with knowledge that it had been stolen (A. 74).

3. Petitioner contends that evidence relating to the television set found and examined in the apartment

should have been suppressed. Miss Hilan testified that when she answered the downstairs door (from which the stairs led up to her own apartment door), the agents identified themselves, walked to the middle of the stairs, and said, "We want to talk to you"; that they caught sight of the television set in her living-room through the open apartment door; and that she consented to the more thorough examination of the set (A. 14-15; Pet. 4-5). At trial [4] Agent Genakos testified, however, that on October 19, 1965, when Miss Hilan answered the doorbell, the agents identified themselves and told her that they would like to talk to her. Miss Hilan replied that inasmuch as she had a nineteen-month-old baby in her apartment, she would prefer that they converse there, and invited both agents into the apartment in which the television was found (A. 46-47).

Even if Miss Hilan's testimony is credited, there is no showing that the agents uncovered the television set as a result of an illegal search. She testified that the agents viewed the set through the open door to the apartment once they reached the top of the stairs. The television set, according to her testimony, was in

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[4] Miss Hilan testified at a pre-trial hearing on petitioner's motion to suppress. Before the government presented any evidence at that hearing, the district court denied the motion to suppress on the ground that petitioner lacked standing to challenge the legality of the search of the apartment in which he lived under an adulterous relationship. At trial, the government, having doubts as to the correctness of the ruling on standing, was permitted to reopen the hearing on that motion outside the presence of the jury. The government conceded that petitioner had standing in the court of appeals.

open view, and no search was involved. Cf. *Hester* v. *United States*, 265 U.S. 57. Both the government's evidence and Miss Hilan's testimony are in accord that she consented to the examination of the television set after the agents saw it. Since there is no showing whatsoever that that consent was gained by a coercive demand under color of authority, petitioner's reliance upon *Amos* v. *United States*, 255 U.S. 313, and *Johnson* v. *United States*, 333 U.S. 10, is misplaced.

Petitioner further argues that one co-tenant cannot validly consent to a search as against another co-tenant. That question, however, is not presented here. Both petitioner and Miss Hilan told the arresting agents that petitioner had given the television set to Miss Hilan (A. 23, 47). Therefore, petitioner had no interest in the television set, and Miss Hilan could validly consent to the examination of the television set which was hers alone. In any event, it is well settled that "* * * where two persons have equal rights to the use or occupation of premises, either may give consent to a search, and the evidence thus disclosed can be used against either." *United States* v. *Sferas*, 210 F.2d 69, 74 (C.A. 7), certiorari denied, sub nom. *Skally* v. *United States*, 347 U.S. 935; *Roberts* v. *United States*, 332 F.2d 892 (C.A. 8), certiorari denied, 380 U.S. 980; *Nelson* v. *California*, 346 F.2d 73, 77 (C.A. 9), certiorari denied, 382 U.S. 964. Petitioner's argument (Pet. 12-16) that the above rule is an artificial one, and does not respect the right of privacy, is unfounded. Since cotenancy imparts that each co-tenant has rights in the

whole property, there is no reason why either one should not be able to consent to entry and search of the property shared in common.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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